IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of	)	No. 55456-5-I
RONNIE L. JOHNSON,	)	**DIVISION ONE**
Appellant.	)	UNPUBLISHED OPINION
	)	FILED: July 17, 2006

APPELWICK, C.J. — Shortly before he was scheduled to be released from prison, Ronnie Johnson was tried and committed as a sexually violent predator (SVP). He claims that several errors occurred during his trial that require reversal. He claims that his counsel was ineffective, that the trial court improperly commented on the evidence, that he was denied his right to effectively cross-examine a witness, that he was denied his right to present evidence, and that the trial court erred in one of its jury instructions. Johnson also asserts cumulative error. We affirm on all issues.

FACTS

In March 2003 the State filed a petition alleging that Ronnie Johnson is a sexually violent predator (SVP). At the time Johnson was serving a sentence for

two counts of communicating with a minor for immoral purposes.[1] The court found probable cause to detain Johnson, and his trial occurred in October and November 2004.

Pre-trial, both Johnson and the State moved to exclude certain evidence. Johnson moved to exclude evidence of a kidnapping charge from 1991. Johnson had allegedly forced the victim, 16-year-old Rachelle Parsons, into his car at gunpoint and masturbated while she was in the car. Johnson denied any use of force and pleaded guilty to communicating with a minor for immoral purposes. He had been acquitted on the 1991 kidnapping charge. The court ruled that if Johnson agreed not to contest Parsons's testimony that she was forced into the car, then the fact that Johnson allegedly used a gun would not be admissible. Johnson elected not to contest Parsons's testimony.

Johnson also moved to exclude the findings of fact and conclusions of law from his 1995 judgment and sentence. The court redacted the non-sexual findings, but admitted the rest of the findings and conclusions as Exhibit 26.

Finally, Johnson argued that he was entitled to elicit evidence from his experts regarding the "recent overt act" provision in the SVP law. He claimed that this evidence would show an additional deterring factor for him upon release. The court allowed Johnson to testify on the effect of the recent overt act provision, but precluded his experts from doing so.

The State also sought to exclude evidence. The State moved to exclude

[1] The qualifying offense for SVP purposes was an indecent liberties conviction in 1980.

evidence regarding In the Matter of Angela M. Coffel, 117 S.W.3d 116

(Mo. App. 2003), a Missouri case in which the State's expert in the instant case, Dr. Amy Phenix, also gave testimony. Phenix's testimony had been ruled inadmissible in Coffel, and Johnson wished to use the case to show that Phenix's testimony was unreliable. The court excluded the evidence as irrelevant.

During trial, portions of Johnson's deposition testimony were read to the jury. Johnson's counsel had not redacted a portion of Johnson's testimony that briefly referenced a gun with respect to Parsons. One of the questions that the jury submitted was whether it could ask Johnson about the gun, and whether the gun was used on Parsons. The court responded in conformance with its earlier ruling, stating that Parsons could not testify as to the details of the force, and that Johnson was not contradicting Parsons.

Towards the end of trial, Johnson's counsel told the court that she had just found out that one of her witnesses, the director of the Sex Offender Treatment Program (SOTP), was going to testify that he thought Johnson would not be eligible for the treatment program if released. Johnson and another witness had testified that Johnson would be eligible. The court ordered that the witness develop the record outside the presence of the jury, but Johnson's counsel asked Johnson about this new information on redirect.

Johnson, his wife, and Johnson's expert all testified regarding the deterrent and mitigating effect that his wife would have on Johnson if Johnson were released. Over Johnson's objection, the court instructed the jury on the law

of spousal privilege, reasoning that the jury should know of the potentially limited value of Johnson's wife as a deterrent.

The jury found that the State had proven beyond a reasonable doubt that Johnson was an SVP. Johnson timely appeals.

ANALYSIS

I. Ineffective Assistance of Counsel

Johnson asserts that his trial counsel was ineffective in two ways: by failing to redact all of the gun testimony from his deposition, and by eliciting information from Johnson about his potential ineligibility for a post-release treatment program. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his or her lawyer's performance was so deficient that the lawyer was not functioning as "counsel" for Sixth Amendment purposes, and (2) that there is a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The defendant must show that there were no legitimate strategic or tactical reasons for counsel's conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). When assessing the adequacy of the lawyer's performance, courts apply a strong presumption of reasonableness. Thomas, 109 Wn.2d at 226.[2]

A. Failure To Redact a Gun Reference From Johnson's

[2] Although SVP proceedings are civil in nature, defendants have a statutory right to counsel at all stages of the proceeding and courts apply the Strickland standard to determine whether counsel was ineffective. RCW 71.09.050(1); In re Det. of Stout, 128 Wn. App. 21, 27-28, 114 P.3d 658 (2005); In re Det. of Smith, 117 Wn. App. 611, 617-18, 72 P.3d 186 (2003).

Deposition

Johnson asserts that his trial counsel was ineffective for not redacting a

portion of Johnson's deposition testimony that referenced a gun. The trial court had ruled that if Johnson did not challenge Parsons's testimony that she was forced into the car, the details of the force, including the gun, would be inadmissible. But counsel did not redact the following portion of Johnson's testimony:

> Q: But you were properly registered with Skagit County when you committed the '94 offense, correct?
> A: Yes.
> Q: And you were a Level III at that time?
> A: Yes. That was because of the '92 thing with the gun.
> Q: The 15 year old that happened in 1991, if she would have been compliant with you –
> A: 15 year old?
> Q: The 16 year old in 1991.

After Johnson testified, the jury asked the following question:

> Can questions be asked of Mr. Johnson about his read deposition? If so, Mr. Johnson stated during cross exam that he never used force to get girls in his car. During the deposition Mr. Johnson was asked about a specific victim—he responded with a clarification request. He said: you mean the one with the gun? It seemed this was about Rachel? What was the gun used for? Was it used to force her into the car? Or another victim into your car?

Johnson claims that without evidence of the gun, jurors may have believed Johnson was not likely to commit a future act of sexual violence.

Johnson's counsel's performance was deficient because counsel failed to redact a damaging portion of Johnson's deposition testimony that the trial court had specifically excluded, and there was no strategic reason for doing so. But Johnson's claim fails because he cannot show that the performance prejudiced his defense. This is because he cannot show a reasonable probability that

without the gun testimony in the deposition, the outcome would have been different.

First, the trial court denied the jury's request to question Johnson about the gun. The trial court specifically instructed the jury that Parsons was not allowed to testify as to the details of the force used, and that Johnson did not offer any testimony to contradict Parsons. There was no other testimony regarding the gun.

Second, the other evidence overwhelmingly supported the conclusion that Johnson was an SVP. The SVP statute requires that the State prove beyond a reasonable doubt:

> (1) That the respondent has been convicted of or charged with a crime of sexual violence; and
> (2) That the respondent suffers from a mental abnormality or personality disorder; and
> (3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility.

Det. of Thorell, 149 Wn.2d 724, 742, 72 P.3d 708 (2003).

Phenix testified that Johnson has been committing sexual acts against minors since he was teenager. Her testimony was based on acts Johnson disclosed during treatment and in his "autobiography," as well as Johnson's interviews, depositions, and conviction records. Most of the offenses to which Johnson admitted in these materials were never charged as crimes. The uncharged acts that appear from his statements to qualify as sexually violent offenses today include: five to ten incidents of putting his penis between the legs

of a six- or seven-year-old female relative and fondling her genitals when Johnson was 15 or 16, acts likely to qualify as first degree child molestation; intercourse with a 12- or 13-year-old neighbor girl when Johnson was between 14 and 16, acts that could qualify as second degree rape of a child; putting his penis between the legs of a five-year-old neighbor girl for the purposes of sexual stimulation when Johnson was 16 or 17, an act likely to qualify as first degree child molestation; intercourse with four 13-year-old girls when Johnson was in his early twenties, acts that likely qualify as second degree rape of a child; and putting his penis to the lips of a sleeping nine-year-old child Johnson was babysitting when Johnson was in his mid-thirties, an act likely to qualify as first degree child molestation.

The charged offenses further support this pattern: he has a 1980 indecent liberties conviction for fondling the breast area of a 12-year-old girl and ejaculating, after she refused to touch his genitals or allow him to touch hers. Johnson also rubbed the genitals of a six-year-old girl he was babysitting in 1994, an incident for which the State initially charged first degree child molestation, but agreed to reduce the charge to two counts of communicating with a minor for immoral purposes if Johnson would agree to exceptional consecutive sentences on each count. Johnson himself admitted to some of these acts on the stand, including the sexual acts with his young female relative and the 1980 indecent liberties incident.

Phenix's testimony established that Johnson had been continually

offending since he was a teenager, with the only significant breaks without committing sexual offenses or exposing himself during his adult life occurring while he was in prison. The evidence was compelling that Johnson was likely to commit future acts of predatory sexual violence and that he met the definition of an SVP. Although none of Johnson's other admitted acts involved a weapon, a weapon is not required as the basis for a sexually violent offense. RCW 71.09.020(9), (15). Johnson therefore has not shown that the outcome would likely have been different without the gun evidence. There was no ineffective assistance.[3]

B. Eliciting Testimony From Johnson That He Was Ineligible For SOTP

Johnson contends that his counsel was ineffective for eliciting testimony from him on redirect examination regarding new information about Johnson's possible ineligibility for the outpatient sex offender treatment program (SOTP) upon release. He claims that if the trial court had been allowed the opportunity, it likely would have excluded the new information because it was of little relevance and was very unfairly prejudicial.

The new evidence came to light when the State indicated its desire to call Dr. Gerald Hover, the director of the SOTP, originally a defense witness.

[3] The State raises a cross-assignment of error in its brief, claiming that the trial court erred in excluding any reference to Johnson's use of a gun in kidnapping Parsons. But a party seeking cross-review must file a timely notice of appeal or notice of discretionary review. RAP 5.1(d). The State did not do this. Thus, the State cannot seek the affirmative relief of a reversal of the trial court's ruling. Further, insofar as this assignment of error goes to a rebuttal of Johnson's contention that he received ineffective assistance of counsel when his trial counsel did not redact a portion of Johnson's deposition that referenced a gun, we have already determined that counsel was not ineffective. Thus, we need not address the State's argument.

Johnson's counsel told the court that she did not wish to call Hover because Hover had recently told her that his interpretation of a new Department of

Corrections (DOC) policy was that Johnson would not be entitled to State treatment upon release. The court ruled that Hover could testify with the jury absent to develop the record on the issue, and at that point the court would decide whether Hover would testify in front of the jury. But right after this exchange, Johnson's counsel elicited testimony from Johnson on redirect about the possible policy change, and Johnson testified that he would find his own therapist if he had to. Afterwards the court decided that Hover did not need to be called because Johnson had essentially told the jury what Hover would have said.

Johnson's claim of ineffective assistance fails because his counsel's actions can be explained as legitimate trial strategy. Up to that point in the trial there had been numerous mentions of Johnson using post-release, State-provided treatment programs. Johnson himself mentioned the programs numerous times, testifying that if released, he planned to continue treatment. And Johnson's treatment provider testified that Johnson intended to continue his treatment once released, and that treatment was available to offenders once released. Johnson's counsel could have reasonably believed that it would be tactically preferable for the jury to hear this new evidence from Johnson, rather than take the risk that the State would call Hover or some other witness to rebut Johnson's testimony that this treatment was available to him. As Johnson's credibility was crucial to the case, it could have been very damaging to have this new information first mentioned by another witness. Counsel could have

reasonably concluded that the risk of the State bringing the evidence in outweighed the chance that the court would exclude any reference to Hover's interpretation of the new DOC rules. Johnson's second ineffective assistance claim fails.

II. Comment On The Evidence

Johnson claims that the trial court improperly commented on the evidence on two occasions. "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, § 16. "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

A. Exhibit 26

Johnson argues that by admitting Exhibit 26, the court improperly commented on the evidence. Exhibit 26 contained the trial court's findings for Johnson's exceptional sentence in 1995, including the finding that Johnson "presents a particular danger to children." Johnson claims that by admitting this exhibit, the trial court was essentially telling the jury that it was the opinion of the court that Johnson was dangerous to children, a conclusion that only the jury could make.

Johnson is incorrect. The findings and conclusions were made by a different judge in a different proceeding in 1995. Johnson agreed to the findings

and conclusions as part of a plea agreement. Johnson has pointed to no evidence that the trial court here indicated that its opinion was that those findings were still true of Johnson today. Further, Johnson has not claimed that the findings and conclusions were irrelevant or unfairly prejudicial.

B. Instructions Regarding Force Used on Parsons

Johnson also claims that the trial court improperly commented on the evidence when, after the jury asked about Parsons and the gun, the trial court instructed the jury that Parsons could not testify as to the details of the force used and that Johnson offered no specific testimony contradicting Parsons's testimony on the force. He notes the following testimony the State elicited from him on cross-examination:

> Q: Let me ask you this: Are you saying that you never forced anyone into a car?
> A: Yes, ma'am.
> Q: And how would you get them in the car?
> A: I'd ask them.
> . . .
> Q: Now, am I understanding you to say that you never forced anyone into the car or forced anyone to engage in sex with you?
> Mr. Carroll: Objection, asked and answered.
> The Court: Sustained.
> Ms. Flemming: I don't think the last part was asked and answered.
> Q (by Ms. Flemming): Am I to understand that you are saying there was never any force involved? Is that what you are saying?
> A: There's inherent force when you have somebody in your car and you are driving down the road, there's inherent force.
> I never used physical force to get them to do anything, but there was inherent force of just being in a car driving down the road, yes.

The court's instruction to the jury that Johnson offered no specific testimony contradicting Parsons's testimony on the force, Johnson argues, essentially told

the jury to disregard Johnson's testimony above.

Even if we assume that the response to the jury was a comment on the evidence, no prejudice resulted. Once the appellate court has decided that the trial judge's actions constitute a comment on the evidence, the court assumes the comments were prejudicial. Lane, 125 Wn.2d at 838. The State then has the burden to show that no prejudice resulted unless it affirmatively appears from the record that no prejudice could have resulted. Lane, 125 Wn.2d at 838-39.

The State has shown that no prejudice resulted. Johnson claims that the comments told the jury that Johnson's testimony regarding the force "did not count." Assuming this is true, the evidence in the record, apart from the evidence of the Parsons incident, was so compelling that the jury could not have reached any conclusion but that Johnson was an SVP. As we noted above in the context of Johnson's ineffective assistance argument, the State placed numerous instances of Johnson's sexual acts against children into the record, some of which Johnson admitted to on the stand. Thus, any comment with respect to the Parsons incident was not prejudicial.

III. Right to Effective Cross-Examination

Johnson asserts that the trial court denied him his right to meaningfully cross-examine the State's expert, thus denying him due process. Johnson wished to cross-examine Phenix about a Missouri case, In the Matter of Angela M. Coffel, 117 S.W.3d 116 (Mo. App. 2003), in which Phenix testified that a female offender was likely to reoffend, but did not base that assessment on any

actuarial tools. The Coffel court held that Phenix's testimony was inadmissible because it was not based on scientific principles generally accepted in the scientific community. Coffel, 117 S.W.3d at 129. Johnson argues this information is relevant because Phenix's willingness to engage in speculation informed her ability to render a reliable opinion in Johnson's case.

Since the SVP statute is a civil statute, the right to confrontation established in the federal and Washington constitutions does not apply. See Det. of Brock, 126 Wn. App. 957, 963, 110 P.3d 791 (2005). However, involuntary commitment is a significant deprivation of liberty triggering due process protection. Det. of Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003) (citing Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)).

"Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." ER 611(b). Specific instances of the conduct of the witness, for purposes of attacking or supporting the witness's credibility, may not be proved by extrinsic evidence. ER 608(b). However, if the conduct is probative of truthfulness or untruthfulness, the court may allow inquiry on cross–examination. ER 608(b). We will not disturb a trial court's ruling regarding the scope of cross-examination absent an abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984).

The trial court did not abuse its discretion in not allowing Johnson to cross–examine Phenix about Coffel. Johnson wished to use Coffel to attack Phenix's credibility and show that Phenix's willingness to speculate on the likelihood of reoffense in Coffel affected her ability to render a reliable opinion in this case. But this is specifically not allowed by ER 608(b) because Phenix's testimony in Coffel is not probative of her truthfulness or untruthfulness, if anything, it speaks to her willingness to speculate.

Further, even when the right to confrontation applies, the evidence must still be relevant and not unfairly prejudicial. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Phenix's Coffel testimony does not meet that standard. In Coffel, Phenix used her clinical judgment to assess the defendant's risk to reoffend because there were no actuarial table or studies dealing with female offenders. Coffel, 117 S.W.3d at 128-29. The court found this was inadmissible because it was not based on accepted scientific principles. Coffel, 117 S.W.3d at 129. But here, there were actuarial tables and studies that Phenix did use to come to her conclusion about Johnson. Thus, the fact that Phenix used another method in a case in which actuarial table and studies were not available to her does not make it more likely that her opinion in this case was not based on tables and studies and was speculative. Johnson's due process rights were not violated.

IV. Right to Present Evidence

Johnson contends that two of the court's rulings denied him his right to

present evidence in his own defense. The trial court ruled that Johnson could not question his expert witness about how the recent overt act law affected her risk assessment. And the trial court also ruled that Johnson could not question his potential probation officer about his ability to arrest Johnson for committing a recent overt act.

Involuntary commitment triggers due process protection. Thorell, 149 Wn.2d at 731 (citing Foucha, 504 U.S. at 80). Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. We review a trial court's ruling on admissibility of evidence for an abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995).

Besides convicted sex offenders who are about to be released from prison, the SVP statute also provides a mechanism to commit convicted sex offenders living in the community. RCW 71.09.060(1). In the latter circumstance, the State must prove beyond a reasonable doubt that the person committed a recent overt act, defined as "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." RCW 71.09.060(1), 020(10).

Johnson wished to introduce evidence of the recent overt act provision,

both through his own testimony and the testimony of his experts and probation officer, to show an additional deterrent to reoffend. The trial court ruled that the evidence was cumulative and misleading, and that Johnson's witnesses could not mention the recent overt act provision. The trial court did allow Johnson to testify about the recent overt act provision.

Even if the trial court did err in not allowing Johnson's witnesses to testify about the recent overt act provision, such error was harmless. This is because any error was cured by the fact that Johnson himself testified about the risk of commitment if he committed a recent overt act. When asked what incentives he had not to reoffend or get into other trouble, Johnson gave two reasons. First, he mentioned that he could get a second strike and spend the rest of his life in prison. He also listed:

> a recent overt act. What that means is if I do something that my therapist, my CO, the police, prosecutor, whoever, deems also an overt act towards—sex with a minor or sex—it could be most anything, that I would be picked up and brought back and have another petition put against me for civil commitment.
>
> In the group I am in there's a gentleman that was just brought back on a recent overt act, and he was brought back for taking pictures of minors at a swimming pool, and that was enough to bring him back.

Johnson later explained the types of activities that could constitute a recent overt act, including driving around aimlessly, going to places where minors congregate, and giving "attitude" to his treatment provider or CO, a sign that "there's something going on." This testimony sufficiently informed the jury of the deterrent effect on Johnson of the recent overt act provision. Johnson's claim

fails.

V. Spousal Privilege

Johnson claims that the trial court erred when it instructed the jury on the law of spousal privilege. He asserts that the instruction was of very little relevance, as it was extremely speculative that Johnson would prevent his wife from testifying against him at some future date. And the instruction was prejudicial, he contends, because it implied that his wife would not be a protective factor for him.

Although the objection here is to a jury instruction, Johnson's claim is, in essence, an evidentiary objection: that the subject matter of the instruction was not relevant and was unfairly prejudicial. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. But relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice. ER 403. We review a trial court's ruling on admissibility of evidence for an abuse of discretion. Pirtle, 127 Wn.2d at 648.

The law of spousal privilege was relevant because it lessened the deterrent effect of Johnson's wife, and was thus relevant to Johnson's likelihood of committing predatory acts of sexual violence. If Johnson's wife could not testify against him, her effect on Johnson as a deterrent would not be as strong. In addition, the instruction was not unfairly prejudicial, because it still allowed

Johnson to testify that his wife could report him for misbehavior, and act as a deterrent in other ways. The trial court did not abuse its discretion.

VI. Cumulative Error

Johnson argues that, even if none of the errors standing alone are sufficient for reversal, the cumulative effect of the errors dictates reversal. The only possible errors are the failure to redact the gun testimony from the deposition, and the trial court's instruction to the jury that Johnson was not offering testimony to contradict Parsons's testimony that she was forced into the car. As noted in the analysis of both of these issues, there were numerous other instances of Johnson's sexually violent and predatory behavior from which the jury could have concluded that Johnson was an SVP. The cumulative effect of these errors is thus insufficient to justify reversal.

We affirm.

Appelwick, C.J.

WE CONCUR:

Dwyer, J.

Baker, J.